STATE OF MICHIGAN

COURT OF APPEALS

MONTCALM FIBRE COMPANY, INC, JAMES TRENT, THOMAS BRUINSMA, Trustee of the ESTATE of MONTCALM FIBRE COMPANY, and ELIZABETH CHALMERS, Trustee of the ESTATE of JAMES TRENT,

Plaintiffs-Appellants,

v

ADVANCED ORGANICS,

Defendant/Cross-Defendant-Appellee,

and

AMVD CENTER, INC., and ANTHONY VAN DILLEN,

Defendants/Cross-Plaintiffs-Appellees.

UNPUBLISHED
April 26, 2005

No. 249642
Calhoun Circuit Court
LC No. 00-003010-NZ

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal by right the dismissal of all claims for losses alleged to have resulted from a fire that destroyed a warehouse. We affirm.

The trial court ruled that plaintiff James Trent and his bankruptcy trustee, Elizabeth Chalmers, lacked standing to assert personal claims. The court therefore granted defendants' motion for summary disposition under MCR 2.116(C)(8). The trial court also ruled that Montcalm Fibre Company, Inc. (MFC) and its bankruptcy trustee, Thomas Bruinsma, failed to create a genuine issue of fact that the fire caused damage beyond that which was compensated for by insurance. So, the court granted defendants' summary disposition. MCR 2.116(C)(10).

We review de novo a trial court's grant of a summary disposition motion. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A party's motion under MCR

2.116(C)(8) asserts the opposing party failed to state a claim upon which relief may be granted. The motion tests the sufficiency of the complaint on the basis of the pleadings alone. MCR 2.116(G)(5); *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). The motion must be granted if no factual development could justify the claim for relief. *Id.*

A party's motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Corley, supra* at 278. The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), and has the initial burden of supporting its position with documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Corley, supra* at 278. If the moving party fulfills its initial burden, the party opposing the motion must proffer legally admissible evidence that demonstrates a genuine issue of material fact exists, and upon failure to do so, summary disposition is properly granted as a matter of law. *Id.*; *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

In this case, MFC, owned by plaintiff James Trent, recycled industrial waste. MFC leased to purchase the warehouse from defendant AMVD Center, Inc (AMVD), owned by defendant Anthony Van Dillen. A part of the warehouse was already occupied by defendant Advanced Organics (AO) and another tenant. The fire started in AO's portion of the warehouse and spread to MFC's portion, destroying its inventory of partially recycled waste. Plaintiffs claim a plastic parts manufacturer, Composite Technology Company (CTC), failed to buy MFC's assets because of the fire, which plaintiffs allege caused MFC's primary lender, Huntington Bank (the bank), to call its loan, forcing MFC and Trent into bankruptcy.

Plaintiffs commenced the instant action in the Calhoun Circuit Court, seeking damages from AO under theories of negligence, gross negligence and nuisance, and to recover against Van Dillen and AMVD under theories of negligence, breach of contract and nuisance. AMVD Center and Van Dillen filed a cross-complaint against AO.

The trial court granted AO's motion for summary disposition against plaintiffs Trent and Elizabeth Chalmers, trustee of the Estate of James Trent by order entered on February 24, 2003. The court then granted summary disposition against the same plaintiffs and in favor of defendants AMVD and Van Dillen by order entered on March 18, 2003. On April 9, 2003, the trial court granted summary disposition in favor of defendants on all plaintiffs' remaining claims.

Plaintiffs filed a claim of appeal in Docket No. 248268 on April 29, 2003. This Court dismissed plaintiffs' first claim of appeal on June 2, 2003 because the cross-claim, which also sought damages for having to defend plaintiffs' complaint, had not yet been dismissed so the trial court's April 9, 2003 order was not final. Subsequently, the trial court dismissed the cross-claim without prejudice pursuant to the cross-parties' stipulation. On September 25, 2003, this Court denied defendants' motion to dismiss plaintiffs' second claim of appeal. Our Supreme Court denied defendants' application for leave to appeal on February 27, 2004.

I.

Trent and his bankruptcy trustee first argue that the trial court erred by ruling they lack standing to assert claims for damages as a result of the fire. We disagree.

We conclude the trial court correctly dismissed Trent's claims for personal damages as a result of alleged injuries sustained by MFC. As a shareholder, officer, and potential beneficiary of successful corporate activities, Trent has no standing to allege personal injury because of damage to MFC. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 473-474; 666 NW2d 271 (2003); *Michigan Nat'l Bank v Mudget*, 178 Mich App 677, 679-680; 444 NW2d 534 (1989). Chalmers' claim as trustee of Trent's bankruptcy estate also fails because the trustee stands in the shoes of the bankrupt and can assert no greater claim. *Hays and Co v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 885 F2d 1149, 1153 (CA 3, 1989).

The real party in interest must prosecute a cause of action. MCR 2.201(B). In general, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of *contract or tort*, must be brought in the name of the corporation and not that of a stockholder, officer, or employee." *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991), citing *Mudget, supra* at 679. Further, Michigan law "treats a corporation as entirely separate from its shareholders, even where one person owns all the corporate stock." *Belle Isle Grill, supra* at 473-474. To avoid the application of the general rule an individual must establish the violation of a duty owed directly to the individual that is independent of the corporation. *Id*. at 474. "This exception does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally." *Mudget, supra* at 679-680. In other words, when a person asserts claims for injuries only on the basis that a duty owed to the corporation was violated that in turn resulted in injury to the individual, the claims are merely derivative and the individual has no right of action against a third party that injured the corporation. *Id*. at 680.

Here, one corporation, AMVD leased space in the same building to two other corporations, AO and MFC. Plaintiffs' do not allege the existence of a contract between Trent as an individual and AMVD or Van Dillon, and do not allege Trent occupied or stored his own personal property in the building. Rather, plaintiffs allege in Count I of their second amended complaint that AO's negligence permitted the fire to start and spread to that part of the building MFC occupied. But this is an allegation of a breach of a duty owed to MFC. Similarly, Count II alleges gross negligence by AO, which again asserts a breach of a duty owed to MFC. The same analysis applies to plaintiffs' nuisance claim in Count III. Plaintiffs' allege breach of contract between AMVD and MFC in Count IV but raise no allegations that would sustain a claim that the contract was specifically intended to directly benefit Trent so as to permit him to enforce the contract as a third-party beneficiary. See MCL 600.1405; *Koenig v South Haven*, 460 Mich 667; 597 NW2d 99 (1999). Further, plaintiffs allege in Count V that AMVD and Van Dillen were negligent but again fail to allege a duty owed directly to Trent as an individual. In addition, plaintiffs allege no special relationship that would impose a duty of care on Van Dillen in favor of Trent as an individual. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Finally, plaintiffs' claim of nuisance against AMVD and Van Dillen in Count VI also does not allege a duty owed directly to Trent. Moreover, a cause of action for emotional distress as result of injury to MFC's property is unrecognized in Michigan even if a duty were owed directly to Trent. See *Bernhardt v Ingham Regional Medical Center*, 249 Mich

App 274; 641 NW2d 868 (2002). "Compensatory damages are not given for emotional distress caused merely by the loss of the things, except that in unusual circumstances damages may be awarded for humiliation caused by deprivation, as when one is deprived of essential elements of clothing." *Id*. at 281. Because Trent and his bankruptcy trustee do not allege claims distinct from those of MFC they lacked standing to sue defendants. *Belle Isle Grill, supra* at 474.

II.

Next, plaintiffs argue the trial court erred by ruling that insufficient evidence existed to create a genuine issue of material fact that the fire caused damage to MFC beyond that which was compensated by insurance. Again, we disagree.

A.

Plaintiffs claim that defendants are responsible for a fire that destroyed MFC inventory and thereby caused (1) the bank to prematurely foreclose on its 90-day $1,200,000 note, (2) CTC to abandon its proposed purchase of MFC's assets, and (3) MFC to declare bankruptcy. But plaintiffs produced insufficient evidence from which reasonable jurors could infer it more likely than not that but for the fire the asserted injuries would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994); *Davis v Thorton*, 384 Mich 138, 145; 180 NW2d 11 (1970). Further, even if the fire contributed to plaintiffs' asserted injuries, the evidence failed to establish the fire as a substantial factor. *Id*.; *Brisboy v Fibreboard Corp*, 429 Mich 540, 547, 418 NW2d 650 (1988). Giving plaintiffs the benefit of the doubt, reasonable jurors would be unable to find that it was more likely than not that the fire was both the factual and a proximate cause of plaintiffs' injuries. Consequently, the trial court properly granted summary disposition to defendants. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Davis, supra* at 146.

Plaintiffs assert theories of negligence, gross negligence, breach of contract, and nuisance. All of these legal theories require proof that defendants' conduct proximately caused the claimed injuries. "To establish a prima facie case of negligence, a plaintiff must be able to prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Haliw v City of Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Likewise, private nuisance requires proof that "'the invasion results in significant harm [and] the actor's conduct is the legal cause of the invasion.'" *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995), quoting *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992). Further, a "party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

To establish the element of causation, plaintiffs must prove both cause in fact and proximate cause. *Haliw, supra* at 310; *Skinner, supra* at 162-163. Cause in fact requires establishing that the claimed injuries would not have come about but for defendants' conduct. *Id*. at 163. Although a plaintiff may prove cause in fact by circumstantial evidence, the evidence must facilitate reasonable inferences of causation rather than mere speculation to be adequate. *Id* at 164. Our Supreme Court explained in *Skinner, supra* at 164:

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, *indicating a logical sequence of cause and effect*, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [Emphasis added.]

Because of the necessity of a logical connection of cause to effect, causation is the element most susceptible basis for the granting of summary disposition on a tort claim. *Davis, supra* at 145. To survive a defense motion in that regard, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner, supra* at 164-165. A mere possibility that a defendant's conduct caused the claimed injury is not enough. When the element of cause in fact remains one of pure speculation or conjecture, "or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id*. at 165, quoting *Mulholland v DEC Int'l*, 432 Mich 395, 416, n 18; 443 NW2d 340 (1989), in turn quoting Prosser & Keeton, Torts (5th ed.), § 41, p 269. Thus, a plaintiff need not present evidence to negate all other possible causes, but the evidence "must exclude other reasonable hypotheses with a fair amount of certainty" so that the hypothesis on which the plaintiff relies "is more probable than any other hypothesis reflected by the evidence." *Skinner, supra* at 166, quoting and concurring with 57A Am Jur 2d, Negligence, § 461, p. 442.

The issue of proximate causation does not arise until cause in fact is established. *Skinner, supra* at 163. In general, "proximate cause" involves whether the consequences of the defendant's conduct were foreseeable, and whether a defendant should be held legally responsible for such consequences. *Id.* Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury. *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). There may be more than one proximate cause of an injury. *Brisboy, supra* at 547. When several factors contribute to produce an injury, "one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury." *Id*. Whether a defendant's conduct is a proximate cause of a plaintiff's claimed injuries is usually a factual question to be decided by the factfinder, but if reasonable minds could not differ, then the court should decide the issue as a matter of law. *Davis, supra* at 146; *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

After carefully reviewing the record, we believe that reasonable minds could not differ on whether but for the fire CTC would have completed its proposed purchase of MFC assets. There simply is no evidence, much less substantial evidence, from which reasonable jurors could find a logical sequence of cause and effect resulting in the claimed damage: CTC's abandoning its proposed purchase of MFC assets. Rather, the evidence shows that more likely than not the proposed deal was abandoned because MFC could not consistently produce the desired quality of product at a cost CTC found acceptable. Moreover, because the fire-destroyed MFC "inventory" was at best works-in-progress requiring additional expenditures to be transformed into saleable product and at worse, assets with a negative worth, reasonable minds could not

differ on whether but for the fire MFC would have remained solvent. But to the extent the fire was a factor in MFC's financial difficulties and insolvency, the evidence fails to establish the fire as a substantial factor in light of MFC's huge pre-fire debts, MFC's failure to meet its financial obligations both before and after the fire, and the collapse of the MFC asset purchase for reasons unrelated to the fire. In sum, even if the fire contributed to MFC's financial problems it was not a proximate cause of MFC's insolvency and eventual bankruptcy.

Plaintiffs' arguments that disputed questions of material fact remain for trial do not withstand scrutiny. First, plaintiffs posit before the fire (positive) and after the fire (insolvent) pictures of MFC and argue the fire is the reason for the difference. But the evidence does not establish a logical sequence of cause and effect between the positive before the fire picture and the insolvency of MFC after the fire. Plaintiffs point to the affidavit of bank officer Scott Miller and the projection of profits in June letters by CTC's general manager Rick Sofia and his boss at parent company Modern Technologies Corporation (MTC), David Gutridge, as evidence of the positive pre-fire outlook for MFC. In fact, the projections and proposed purchase of MFC's assets precede and form the basis for the bank's 90-day loan to serve as "short term bridge financing until the transaction closed." Further, the evidence shows that the positive projections assumed that MFC could provide a high-volume, low-cost, high-quality stream of plastic resin that CTC could use in its plastic injection molding business. As Sofia testified, "if [MFC] could give me that polymer, I could make gold out of it, . . . [CTC] could process it in our process, so this [the acquisition of MFC] looked fantastic." Unfortunately, the evidence supports Gutridge's testimony that MFC "could not in fact manufacture the product on a consistent basis to the same level of quality at the cost we had been led to believe they could do it at."

Trent's statements to bank officer Steve George and to Sofia that the fire indefinitely delayed the MFC-CTC closing because of lack of raw material necessary to demonstrate compliance with CTC purchase criteria are inadmissible hearsay if offered to prove the truth of the matter asserted. MRE 801, 802. Evidence necessary to withstand a motion for summary disposition must be substantively admissible at trial. *Maiden, supra* at 121.

Plaintiffs also point to the sworn statement of Charles Johnson, MFC vice-president of operations, that it did not make sense for MFC to add more densifiers[1] to increase its output because MFC did not have enough raw materials to meet demand for finished plastic resin. But Johnson also testified that the MFC had sufficient raw materials coming in to its Howard City plant to supply its manufacturing capacity and that the fire had no affect on MFC's ability to manufacture the low-cost, high-quality resin CTC desired. Read as a whole, Johnson's testimony does not support the conclusion that but for the fire MFC would have been able to manufacture the high-volume, low-cost, high-quality resin that CTC desired, which both Trent and Sofia envisioned would generate a pot of gold.

[1] A machine used to process industrial waste into marketable plastic resin. A densifier consisted of a cylinder or tub into which waste was fed at the top and then ground, shredded and melted by blades at the bottom that were driven by a high-horsepower motor.

Similarly, Trent's testimony, on information and belief, that the fire caused CTC to abandon its proposed purchase of MFC assets, resulting in MFC's financial problems, is insufficient to withstand defendants' summary disposition motion. MCR 2.116(G)(4). "'Matters upon information and belief and alleged common knowledge are not enough. [A] party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. If he fails, the motion for summary judgment is properly granted.'" *Skinner, supra* at 161, quoting *Durant v Stahlin*, 375 Mich 628, 640, 135 NW2d 392 (1965).

Trent admitted that he could not dispute testimony of then MFC managers Johnson and James Malkowski that MFC had problems reducing moisture and fiber in the resin it produced. Indeed, Trent admitted MFC was having problems with moisture using the cylinder (densifier) process and acknowledged that MFC had "quality issues related to our production" and "consistency problems." Trent believed this was not really a problem but was instead the result of "tweaking," which would work itself out. Although MFC never achieved CTC's quantity and quality goals for resin production, Trent nevertheless believed it would not be a problem for MFC to do so. Trent also admitted that from Gutridge's perspective, MFC's "tweaking" was producing inconsistent results. Trent testified that after the fire when MFC was demonstrating the cylinder (densifier) process for Gutridge, as the resin "came out of the machine it wasn't the right moisture content or the same moisture . . . so [Gutridge] concluded, 'You've got to work on the consistency,' and left, and that was all I heard from it, and it was basically, [w]e will talk to you in a couple of months, and then in a couple [of] months, we got a Dear John . . . ."

Trent testified that he believed the spectacle of the burned facility "squelched" the MFC-CTC deal. He testified, "I believe that [Sofia's observing the burned warehouse] spooked them and I think their attitude, which they plainly said, was, well we are going to sit back and wait and see what happens. So I think the fire definitely squelched that deal." This testimony, like Trent's testimony that he did not believe either the quality of resin MFC produced or the ability produce the quantities desired by CTC was a problem preventing CTC from going forward with the proposed purchase, is not fact-specific evidence from which a logical sequence of cause and effect can be constructed leading to the conclusion that but for the fire the MFC-CTC deal would have closed. *Skinner, supra* at 160-161. This is particularly true here where either party could have abandoned the proposed purchase for any or no reason.

Plaintiffs also contend that bank officer George's affidavit raises a disputed factual issue of whether the fire caused MFC insolvency by motivating the bank to start early collection efforts on its 90-day note. But George's affidavit does not relate specific facts from which it could be inferred the fire caused MFC's insolvency. The affidavit contains Trent's hearsay statements that are inadmissible to prove the truth of the matter stated. So the affidavit proffers neither admissible fact-specific evidence that the fire affected the financial well being of MFC nor fact-specific evidence supporting an inference that but for the fire the MFC-CTC deal would have closed. Rather, the bank called its loan not because fire actually affected MFC but because Trent made statements to bank employees about alleged effects of the fire, which caused the bank to lose confidence that MFC would complete its asset sale to CTC, which was the purpose of the loan. In addition, the loss of the warehouse inventory could not have immediately affected MFC's solvency because stored materials were not readily saleable, and the evidence shows there was no shortage of raw material to supply MFC's only pre-fire operating production facility in Howard City. In sum, the evidence does not create a genuine issue of material fact

whether the fire affected MFC's solvency, MFC's ability to meet CTC's resin-production criteria, or MFC's ability to pay its 90-day bank note when due. Reasonable jurors could not disagree: the fire did not cause MFC's problems.

For many of the same reasons, the opinion evidence plaintiffs offered does not create a genuine issue of material fact regarding the effect of the fire on MFC's solvency. Ed Dupke, plaintiffs' business valuation expert, opined that the fire impacted MFC because it was a leveraged company that could not withstand the loss of its inventory, diminished cash flow, and the bank's losing confidence its loan would be repaid.

Specially, Dupke testified regarding the fire's financial impact on MFC as follows:

> Cash flow was the thing that put the company in trouble. What disappeared as a result of the fire was saleable inventory that the company had. Sale of that in the normal course of business would have generated a substantial amount of dollars for the company, potentially as much as three to four hundred thousand dollars, and that disappeared from the company's cash flow, as well as the requirement to put out additional cash to rebuild that inventory, and the company was not structured financially strong enough to absorb that hit.
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> As I mention, it's a two-fold impact: One, the loss of the immediate cash flow that would be generated through the sale of the existing inventory that was on hand, and secondly, the working capital which is out-of-pocket cash required to rebuild the inventory into saleable merchandise and to replace the equipment. [Dupke deposition, p. 101.]

The data and the methodology underlying an expert's theories and by which the expert draws his conclusions must be reliable. MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004); *Tobin v Providence Hospital*, 244 Mich App 626, 647; 624 NW2d 548 (2001). "The facts or data in the particular case on which an expert bases an opinion or inference shall be in evidence" MRE 703. Thus, expert testimony may be excluded when the basis of assumptions on which it relies do not comport with the established facts. *Badalamenti v Wm Beaumont Hospital-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999). Because Dupke's opinion is premised on assumptions that do not comport with the evidence, it does not provide admissible evidence to create genuine issue of material fact for trial. *Maiden, supra* at 121.

The testimony by witnesses with knowledge of MFC's destroyed inventory established that almost all of it was unmarketable. MFC asserted in its insurance claim that the lost inventory consisted of 2,928 tons of boxed material and 1,943 tons of bailed material. Johnson in his sworn statement to the insurance company stated that none of the material was in saleable form and at best was semi-processed "works-in-progress." It is also undisputed that two months before the fire, MFC had stopped all manufacturing at the burned warehouse facility.

Trent testified he had observed marketable resin stored at the warehouse but never counted it. Trent identified Johnson as the MFC employee with the best knowledge of the

facilities contents at the time of the fire. Johnson testified that he could not say what marketable resin was stored in the warehouse at the time of the fire and told the insurance company, as noted above, that the inventory destroyed in the fire was not saleable. According to Johnson, marketable resin could be sold for $210 to $230 a ton.

Gino Guarniere, an MFC employee at the warehouse, testified in an affidavit that he and others made concerted efforts to remove any marketable resin from the facility in the months before the fire. Guarniere stated when he was terminated for economic reasons one month before the fire, there were fewer than 25 Gaylord boxes[2] of marketable resin in the warehouse.

Michael Walker worked for MFC in manufacturing and sales out of the warehouse facility. Walker testified that he and other employees in the months before the fire had sorted through what was in warehouse and moved what was marketable to where it could be easily shipped. He attempted to sell anything of value he could find. According to Walker, by the time of the fire only 40 to 48 Gaylord boxes of marketable resin and 20 Gaylord boxes of marketable PBT remained. To the best of Walker's knowledge, no other saleable material was in the burned warehouse. Viewing the testimony of Trent, Johnson, Guarniere and Walker in the light most favorable to plaintiffs, the 70 boxes of marketable product at 1000 pounds a box would yield $8,050 a ton if sold for top dollar of $230.

Moreover, Trent testified that the fire did not affect the MFC's ability to continue its revenue-generating activity of collecting tipping fees (being paid to haul away other businesses' waste), brokerage, and making fuel pellets. Likewise, Johnson testified that MFC's ability to collect sufficient tipping-fee material to supply its Howard City fuel pellet operation was unaffected by the fire. According to Johnson, at the time of the fire although MFC wanted to increase its capacity at its Howard City plant to manufacture resin, MFC "didn't have the manufacturing capacity at a level that could manage the materials coming into Howard City as well as . . . begin to take the materials out of [the warehouse]." Thus, the fire did not affect MFC's cash flow.

In summary, the premises on which Dupke's opinion rests, that the fire impacted MFC by (1) loss of immediate cash flow and (2) the need to spend working capital to replace saleable inventory and equipment, are simply not supported by the evidence. Because the facts and data on which Dupke draws his conclusions are not reliable, his opinion testimony is inadmissible. MRE 702; *Gilbert, supra* at 779; *Badalamenti, supra* at 286.

Thus, plaintiffs failed to present substantial evidence from which a jury could conclude that more likely than not, but for the fire the MFC-CTC deal would have closed, and MFC would have remained solvent. *Skinner, supra* at 164-165. Moreover, to the extent the fire was a factor in CTC's failing to buy MFC's assets, or MFC's failure to meet its financial obligations, reasonable minds could not differ in concluding that the fire was not a substantial factor, i.e., not

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[2] A "Gaylord box," named after the Gaylord Paper Company, is a cardboard box about the size of a four-foot cube, which sits on a pallet and could hold 1,000 pounds of finished resin.

a proximate cause of a plaintiffs' claimed injuries. *Brisboy, supra* at 547; *Nichols, supra* at 532. Accordingly, the trial court properly granted defendants summary disposition as a matter of law. MCR 2.116(C)(10), (I)(1); *Corley, supra* at 278.

B.

Next, plaintiffs argue the trial court erred because it presented evidence that the burned inventory was valued at more than $300,000, yet MFC collected only $64,725 in a fire insurance settlement. Defendants concede a small portion of the destroyed property could have been sold, in the light most favorable to plaintiffs, for less than $10,000. The trial court determined that "the evidence establishes that Plaintiff has in fact been compensated for the loss of its . . . garbage/waste/product which was 'damaged' by the fire." We agree that the trial court correctly granted summary disposition to defendants because in "any tort action, recovery is not permitted for remote, contingent or speculative damages." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989).

Plaintiffs presented evidence that the vast majority of the destroyed property was either waste material other businesses had paid MFC to remove or similar waste that had been semi-processed in the hope it could be converted to profitable, marketable resin. But the process for manufacturing resin at the burned facility had been abandoned before the fire because it was not profitable. So, to convert the semi-processed waste to marketable resin, MFC would have had to transport the material to its Howard City plant and then incur further manufacturing expenses. Likewise, MFC would have to incur further shipping and processing expenses to convert any of the waste material stored at the warehouse into its marginally profitable fuel pellets.

Moreover, the $300,000 value plaintiffs placed on the burned inventory was derived from expenses MFC incurred to ship, process and store the destroyed property. MFC included in its value estimate all of its related business overhead expenses, including taxes, workers' compensation and health insurance, trailer rental, fuel, repair, and maintenance. But plaintiffs cite no authority that supports its position that it may recover as damages in a tort action MFC's expenses related to the damaged property.

Plaintiffs first cites Restatement Torts, 2d, § 903 that "compensatory damages" are "the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." This truism provides little support for plaintiffs' position. Plaintiffs also cite Restatement Torts, 2d, § 911 that "value means exchange value or the value to the owner if this is greater than the exchange value." Comment "*e*" of § 911 states the "phrase 'value to the owner' denotes the existence of factors apart from those entering into exchange value that cause the article to be more desirable to the owner than to others." But plaintiffs provide no evidence that MFC's costs related to the burned property is synonymous with the property's value. Rather, we find more applicable to the facts of this case Restatement Torts, 2d, § 906, which provides compensatory damages will not be awarded without proof of pecuniary loss for (a) harm to property and (b) harm to earning capacity. Further, the victim of a tort "is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." Restatement Torts, 2d, § 912. Plaintiffs point to no evidence from which it can be reasonably calculated what further expenses would have been necessary to convert the

waste and semi-processed waste into marketable product and whether revenues might thereby have exceeded its total costs thus generated.

Plaintiffs also mistakenly rely on *Moline Furniture Works v Club Holding Co*, 280 Mich 587; 274 NW2d 338 (1937) and *Detroit Power Screwdriver v Ladney*, 25 Mich App 478; 181 NW2d 828 (1970). These are contract cases that hold a manufacturer of unique goods may recover costs and lost profits on a buyer's unjustified repudiation of the contract. *Fabrini Family Foods, Inc v United Canning Corp*, 90 Mich App 80; 280 NW2d 877 (1979) also does not support plaintiffs' argument because in that breach of warranty case the plaintiff provided evidence taking the issue of damages, including lost profits, beyond the realm of speculation and conjecture. *Id*. at 85-86.

"'A party asserting a claim has the burden of proving its damages with reasonable certainty.'" *Ensink v Mecosta County General Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004), quoting *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). Although damages cannot be founded upon mere speculation and conjecture, "this does not require absolute mathematical demonstration, . . . [and] compensation may be [awarded] for a pecuniary injury which has resulted from the natural and probable result of a wrong even though the extent of the injury is not capable of precise proof." *Wolverine Upholstery Co v Ammerman*, 1 Mich App 235, 244; 135 NW2d 572 (1965). Thus, in general, where injury is clear and the amount of damages are uncertain, recovery is not precluded. *Id*. But "uncertainty as to the *fact* of legal damages . . . is fatal to recovery." *Id*. Here, although it is undisputed that plaintiffs suffered some injury, uncertainty over the amount of that injury and whether insurance compensated it, renders the determination of whether plaintiffs have, in fact, any remaining legal damages entirely speculative. Because on the evidence plaintiffs produced, its claim for damages to waste it had accumulated and partially processed remains remote, contingent or speculative, the trial court properly granted summary disposition to defendants. *Ensink, supra* at 524*; Stockler, supra* at 33.

III.

To summarize, Trent has no standing to allege personal injury because of damage to MFC; therefore, the trial court correctly dismissed his derivative claims for personal damages as a result of alleged injuries MFC sustained. Chalmers' claims as bankruptcy trustee also fail because the trustee stands in the shoes of the bankrupt, and he can assert no greater claim.

Plaintiffs failed to present substantial evidence from which reasonable jurors could conclude that more likely than not, but for the fire the MFC-CTC deal would have closed, and MFC would have remained solvent. Moreover, to the extent the fire was a factor in CTC's failing to buy MFC's assets, or MFC's failure to meet its financial obligations, reasonable minds could not differ in concluding that the fire was not a substantial factor or a proximate cause of a plaintiffs' claimed injuries. Accordingly, the trial court properly granted defendants summary disposition as a matter of law.

Finally, because the evidence showed plaintiffs' claim for uncompensated damages for fire-destroyed waste it had accumulated and partially processed was remote, contingent and speculative, the trial court properly granted summary disposition to defendants.

We affirm.

/s/ Christopher M Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell